2013

A Visual Guide to United States v. Windsor: Doctrinal Origins of Justice Kennedy's Majority Opinion

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Recommended Citation
A Visual Guide to United States v. Windsor: Doctrinal Origins of Justice Kennedy's Majority Opinion, 108 Nw. U. L. Rev. Colloquy 130 (2013)

A VISUAL GUIDE TO *UNITED STATES V. WINDSOR*: DOCTRINAL ORIGINS OF JUSTICE KENNEDY'S MAJORITY OPINION

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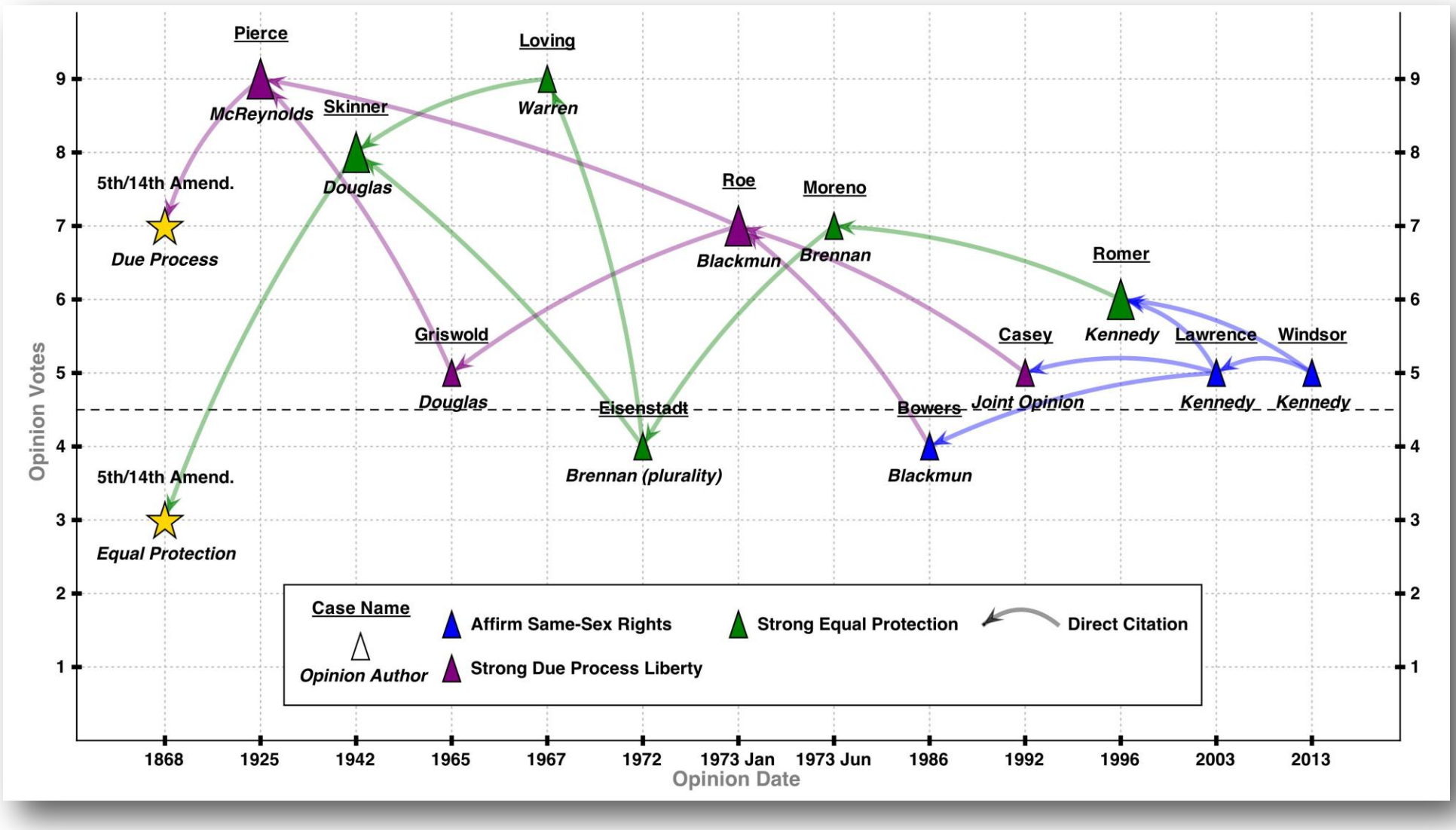

MAP EXPLANATION

After finding that the Court had jurisdiction, Justice Kennedy's majority opinion in *United States v. Windsor*, 133 S. Ct. 2675 (2013), reached the merits and concluded that the Defense of Marriage Act (DOMA) was in violation of the Fifth Amendment. In his dissent, Justice Scalia attacked the majority's doctrinal reasoning on the merits as "nonspecific hand-waving" that invalidated DOMA "maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role." *Id.* at 2707 (Scalia, J., dissenting).

This Map responds to Justice Scalia's accusation by illustrating the doctrinal origins of Justice Kennedy's majority opinion. Specifically, the Map shows how both the equal protection and substantive due process doctrines have contributed to a constitutional jurisprudence that affirms the rights of same-sex couples. The accompanying case descriptions highlight reasoning and quotes that ultimately influenced the majority opinion in *Windsor*.

Moreover, the Map takes the sting from Justice Scalia's complaint that the majority failed to conduct a proper substantive due process analysis. Justice Scalia argued that the opinion failed to ask whether same-sex marriage was a right "deeply rooted in this Nation's history and tradition," *id.* at 2707 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)), and failed to articulate a "tier[] of scrutiny" when considering whether DOMA violated equal protection, *id.* at 2706. As demonstrated in the Map, however, the Court has long applied tests other than Justice Scalia's when conducting both substantive due process and equal protection review. Indeed, Justice Kennedy's doctrinal approach is consistent with precedent and the doctrinal traditions advanced by Justices Douglas, Brennan, and Blackmun.

Note: This Map *is not* the territory. It does not purport to represent every case backing the majority's approach in due process or equal protection doctrine. Rather, it highlights representative and influential opinions that define the basic genealogy of Justice Kennedy's doctrinal argument. Similarly, the Map does not draw every citation connection between opinions; arrows instead represent the key doctrinal lines in the same-sex marriage debate. Finally, note that opinion triangles grow in size based on the number of citations to the opinion represented on the Map.

***Pierce v. Society of Sisters*, 268 U.S. 510 (1925)**
Although the phrase "substantive due process" did not appear in *Pierce*, the case stands as a prominent example of that nascent doctrine. Justice McReynolds's majority opinion struck down an Oregon statute that required public education for all children, finding the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of [their] children." *Id.* at 534–35. Justice McReynolds noted that the Constitution's "fundamental theory of liberty . . . excludes any general power of the State to standardize its children." *Id.* at 535.

***Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)**
Before *Skinner*, equal protection challenges to state legislation usually failed. Yet Justice Douglas's majority opinion struck down Oklahoma's Habitual Criminal Sterilization Act under the Equal Protection Clause. The Act punished those thrice convicted of larceny with sterilization but spared repeat embezzlers. Describing marriage and procreation as "basic civil rights," Justice Douglas concluded "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Id.* at 541.

***Griswold v. Connecticut*, 381 U.S. 479 (1965)**
In *Griswold*, the Court struck down a Connecticut law prohibiting the sale or use of contraceptives. Justice Douglas's majority opinion held the law, as applied to married couples, violated the constitutional right to privacy. "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is . . . an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Id.* at 486.

***Loving v. Virginia*, 388 U.S. 1 (1967)**
In *Loving*, the unanimous Court struck down Virginia's miscegenation law on both equal protection and due process grounds. In his opinion, Chief Justice Warren applied strict scrutiny and concluded that the law discriminated invidiously. He also cited *Skinner* for the proposition that marriage is a basic civil right and concluded that "deny[ing] this fundamental freedom on so unsupportable a basis . . . [is] so directly subversive of the principle of equality at the heart of the Fourteenth Amendment . . . [that it] deprive[s] all the State's citizens of liberty without due process of law." *Id.* at 12.

***Eisenstadt v. Baird*, 405 U.S. 438 (1972)**
In *Eisenstadt*, the Court struck down a Massachusetts law that prohibited distribution of contraceptives to unmarried persons. In his plurality opinion, Justice Brennan ostensibly applied rational basis scrutiny but nonetheless rejected all of the state's asserted rationales for the law. Justice Brennan argued that "[i]f under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible," as the relevant right to privacy inheres in the individual rather than in couples. *Id.* at 453.

***Roe v. Wade*, 410 U.S. 113 (1973)**
Roe famously—and controversially—recognized a substantive due process abortion right. Justice Blackmun's majority opinion claimed doctrinal justification for a constitutional right of privacy from the *Griswold–Pierce* line of cases as well as from other lines including that from *Skinner* to *Eisenstadt*. "This right of privacy," wrote Justice Blackmun, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

***United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973)**
In *Moreno*, the Court struck down a portion of a federal law that denied food stamps to households composed of unrelated individuals. Justice Brennan's majority opinion noted that the legislative history showed that the provision was intended to deny "hippies" and "hippie communes" food stamps. *Id.* at 534. Justice Brennan wrote, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* Justice Kennedy directly cited *Moreno* in *Windsor* and similarly questioned Congress's purpose in passing DOMA.

***Bowers v. Hardwick*, 478 U.S. 186 (1986)**
The majority in *Bowers*, per Justice White, upheld the constitutionality of Georgia's sodomy statute against a same-sex challenge. Like Justice Scalia in *Windsor*, Justice White insisted that only liberties "deeply rooted in this Nation's history and tradition" deserved constitutional recognition. *Id.* at 192 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.)). Justice Blackmun forcefully dissented. He construed the Court's precedent differently and argued that the Constitution protected "the right of an individual to conduct intimate relationships in the intimacy of his or her own home." *Id.* at 208.

***Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)**
The first of four Justice Kennedy majority opinions in the Map, *Casey* (co-authored by Justices O'Connor, Kennedy, and Souter) found that stare decisis required upholding *Roe*'s recognition of a woman's right to choose an abortion before fetal viability. Regarding the proper substantive due process inquiry, *Casey* quoted Justice Harlan: Due process "is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . . No formula could serve as a substitute, in this area, for judgment and restraint." *Id.* at 850 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

***Romer v. Evans*, 517 U.S. 620 (1996)**
In *Romer*, the Court struck down Colorado's Amendment 2 that purported to deny LGBT persons special rights. Justice Kennedy, however, found the law much broader—"[i]t identifies persons by a single trait and then denies them protection across the board. . . . It is not within our constitutional tradition to enact laws of this sort." *Id.* at 633. Arguing that the law's peculiar nature defied conventional rational basis review, Justice Kennedy cited *Moreno* for its proposition that a bare desire to harm unpopular groups violates equal protection. In *Windsor*, Justice Kennedy returned to this proposition and relied heavily on *Romer* in striking down DOMA.

***Lawrence v. Texas*, 539 U.S. 558 (2003)**
In *Lawrence*, the Court overruled *Bowers* and struck down Texas's law against homosexual sodomy. In his majority opinion, Justice Kennedy explicitly embraced the substantive due process logic of Justice Blackmun's *Bowers* dissent and of the *Casey* majority. Tellingly, Justice Kennedy also pointed to *Romer* as evidence that the jurisprudential foundations of *Bowers* had been eroded. Thus, Justice Kennedy in *Lawrence* used an equal protection case to justify finding a substantive due process right. In *Windsor*, Justice Kennedy once again bridged the two doctrines by citing *Lawrence* as reason to strike down DOMA on equal protection grounds. Though Justice Scalia's *Windsor* and *Lawrence* dissents complained about Justice Kennedy's doctrinal crossbreeding, the history revealed by this Map shows that equal protection and substantive due process often form two complimentary sides of the same constitutional coin.

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